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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-450

INGRAM CORPORATION, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY MEMORANDUM

HERBERT J. MILLER, JR.
MILLER, CASHIDY, LARBOGA
& LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
Attorney for Petitioner

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In its brief in opposition, the Government has accorded only footnote attention to the recent case of *In re Grand Jury, J.R. Simplot Co. v. United States District Court*, CCH 1977 U.S. Tax Cas. ¶9146 (9th Cir. Nov. 12, 1976). In that case, the Court of Appeals for the Ninth Circuit held the denial of a motion to vacate a Rule 6(e) order to be appealable and granted

relief on the merits of the appeal. Since that case is in no significant way distinguishable from the instant case, the conflict among the circuits on this issue is even clearer now than it was when our petition was filed. Accordingly, we urge that the Court grant the petition for a writ of certiorari, set this case for argument, and resolve the conflict among the circuits.

In *Simplot*, as in the *Ingram* case, the district court entered an order granting the Government's motion to allow disclosure of grand jury materials and transcripts to certain IRS personnel for analysis.¹ The company moved to vacate that order, and when the motion was denied, the company appealed.

The court of appeals held the denial of the motion to vacate appealable because, absent such an appeal, the "breach of grand jury secrecy resulting from the grant of the district court's Rule 6(e) order [could] never be repaired." *Simplot*, *supra*, at 86,196. Because the company had not yet been indicted, because the grand jury was still in session, and because "the existence of a potential civil tax proceeding has been shown," *id.* at 86,197, the court of appeals held that the denial of the motion to vacate was a final, appealable order under the doctrine of *Cohen v. Beneficial*

¹ The "Rule 6(e) Order" entered in *Simplot* was substantially less offensive than the order initially entered in the *Ingram* case, since the *Simplot* order limited disclosure to IRS agents and since it made no provision for the use of grand jury materials in civil proceedings. The "Rule 6(e) Order" entered in the *Ingram* case on June 14, 1974, by contrast, authorized disclosure of grand jury materials to agents of the FBI, the IRS, and the Postal Inspection Service, and it permitted that disclosure to be made for civil as well as criminal investigative purposes. See Pet. at 12a.

Industrial Loan Corp., 337 U.S. 541 (1949). The court stated that:

"If irreparable breaches of secrecy are possible, Rule 6(e) orders fall within 'that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' Decision on Rule 6(e) orders will dispose of a 'matter separate from the merits of the case.' Irreparable breaches of grand jury secrecy create a sufficient 'danger of denying justice by delay' to outweigh 'the inconvenience and costs of piecemeal review . . .'" Viewing Rule 6(e) orders as worthy of direct review is a continuation of the practice of giving 28 U.S.C. § 1291 appealability a 'practical rather than a technical construction.' It is appropriate to review these orders because as a practical matter such orders will otherwise be unreviewable." *Id.* at 86, 197 (citations omitted).

On the merits, the *Simplot* court held that in light of the possibility of abuse that stems from permitting government agencies access to grand jury materials, agency assistance can never be authorized except after an adversary hearing resulting in a finding that such assistance is necessary. Moreover, the court held that "the district court's duty to safeguard the independence of the grand jury," *id.* at 86,198, requires close supervision of the agency's use of the information acquired from grand jury materials. Because the district court had not held an adversary hearing and had not made an "expert-by-expert" determination of the necessity for agency assistance to the grand jury, the court of appeals vacated the district court's Rule

6(e) order and remanded for further proceedings in the district court.

Simply put, *Simplot* is on all fours with the present case. In both cases, the Government sought and was granted an order permitting IRS agents to examine grand jury materials. In both cases, the company had not been indicted, and the prospect of a civil tax proceeding had been demonstrated. Finally, in both cases the target company sought to have the Rule 6(e) order vacated, and that motion was denied. Yet in *Simplot*, the denial of the motion was held appealable, while in *Ingram*, the ruling was to the contrary. The cases are thus flatly irreconcilable.

The *Simplot* court made an effort to distinguish the *Ingram* case, *Simplot, supra*, at 86, 197 n. 4, but that effort is unavailing. First, the court stated that the *Simplot* case was distinguishable because of the "lack of an indictment." Yet in *Ingram*, the company has never been indicted—although two of its directors have been—and even that indictment was not returned until after the appeal had been filed, briefed, and argued. Surely the existence of an indictment, returned against third parties during the time that the appeal was pending decision, cannot provide a ground for distinguishing the cases on the jurisdictional issue of appealability.

Second, the *Simplot* court sought to distinguish the *Ingram* case on the ground that the court "failed to consider alternatives other than quashing subpoena or disclosure to defendant." *Id.* The meaning of this cryptic reference is somewhat unclear. If the court meant to suggest that the court of appeals failed to consider other alternatives, surely that failure by the court cannot justify its conclusion that the district court's order was unappealable. If it meant to suggest

that the appellant had not requested that the Rule 6(e) order be vacated and the cause remanded to the district court, the court was simply incorrect. Petitioner expressly requested that the court of appeals vacate the order of the district court and remand the matter to the district court to reconsider the propriety of a Rule 6(e) order under proper standards. Pet. at 3-4.

Because the courts of appeals are squarely in conflict on an important point of criminal appellate procedure, we respectfully request that this Court grant the petition for a writ of certiorari and settle that conflict forthwith.

Respectfully submitted,

HERBERT J. MILLER, JR.
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
Attorney for Petitioner